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Nos. 317, 318 and 319

In the

Supreme Court of the United States

No. 18557 (In U. S. Court of Appeals, Fifth Circuit)
HARDWARE MUTUAL CASUALTY COMPANY,
Petitioner,

v.

ADAM McINTYRE,
(hereinafter called McIntyre)
Respondent.

No. 19184 (In U. S. Court of Appeals, Fifth Circuit)
UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioner,

v.

HORACE HART,
(hereinafter called Hart)
Respondent.

No. 19427 (In U. S. Court of Appeals, Fifth Circuit)
STANDARD ACCIDENT INSURANCE COMPANY,
Petitioner,

v.

MARCOS V. AGUIRRE, JR.,
(hereinafter called Aguirre)
Respondent.

MOTION FOR REHEARING OF PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Simultaneously with the denial of the petition for writs of certiorari, this Honorable Court granted to counsel for Respondent, McIntyre, leave to file an amended brief in opposition to the petition for writs of certiorari which was completely at variance with his original brief. Petitioners, it is believed, were not furnished sufficient opportunity to reply

to the argument set forth in this amended brief and substantial grounds are available to Petitioners although not previously presented. Petitioners respectfully request the Court to consider the following answer to such argument.

PRELIMINARY STATEMENT

This motion for rehearing should be granted primarily because the denial of the petition for writs of certiorari leaves the important question of jurisdiction between state and federal courts in utter confusion. For this reason, even counsel for McIntyre suggests at page 4 of his amended brief that "Perhaps certiorari should be granted here".

ARGUMENT

1. Denial of the petition for writs of certiorari results in confusion and uncertainty.

This Honorable Court in *American Fire & Cas. Co. v. Finn, 341 U. S. 6, 95 L. Ed. 702*, said at p. 706:

> "As prompt, economical and sound administration of justice depends to a large degree upon definite and finally accepted principles governing important areas of litigation, such as the respective jurisdictions of federal and state courts, we granted certiorari."

No one could find any fault with the foregoing statement, it is believed. However, denial of the petition in these cases does violence to this pronouncement. COUNSEL FOR RESPONDENTS THEMSELVES HAVE RECOGNIZED THAT THE NEW RULE ADOPTED BY THE MAJORITY OF THE FIFTH CIRCUIT WILL PROMOTE CONFUSION AND HAVE URGED THIS HONORABLE

COURT NOT TO BASE JURISDICTION ON THE COUNTERCLAIM, AS THE FIFTH CIRCUIT DID.

Counsel for Respondents, Hart and Aguirre, has stated to this Court:

> "This Court in Horton v. Liberty Mutual Insurance Company, 367 U. S. 348, permitted a plaintiff to affix jurisdiction by correctly prophesying what the defendant would seek under his counterclaim. In effect, the naked allegation of jurisdictional amount suspends the determination of federal jurisdiction until the defendant affirmatively reveals the amount he seeks under his counterclaim. The Horton case goes no further. THE FOIBLE OF TENTATIVELY PREDICATING JURISDICTIONAL AMOUNT ON A CONJECTURAL SUM THAT THE DEFENDANT MAY CLAIM IS WELL ILLUSTRATED HERE." (Emphasis added.)

He not only referred to this as a "foible", but he further states at p. 12 of the brief filed herein:

> "To predicate federal jurisdictional amount upon *potential*, but not existent counterclaims would not only be contrary to the expressed and controlling command of Congress, 28 U.S.C.A. Sec. 1332(a), but would raise questions with Constitutional overtones."

Counsel for Respondent, McIntyre, who also represented Horton before this Honorable Court, stated in his original brief in opposition to the petition for writs of certiorari that determination of the amount in controversy "*is to be judged as of the time the original complaint is filed.*" He now amends; denies this; and says "Perhaps certiorari should be granted here."[1]

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[1]This statement was made in Respondent Hart's Petition for Writ of Certiorari prior to the decision of the Fifth Circuit, at page 8 thereof. This review of Hart was sought simultaneously with counsel's motion for rehearing in Horton, the Hart case being used to illustrate the folly of the Horton decision.

The foregoing demonstrates beyond controversy that counsel for Respondents themselves are confused. It is indeed a rare case in which the basis for a decision by the majority of the Fifth Circuit Court satisfies neither Petitioners nor counsel for Respondents (who both participated in *Horton*) nor two of the Judges who participated in *Horton*. The *Horton* opinion by this Honorable Court has itself been a source of confusion to courts, litigants and to writers of legal treatises.[2] The following are examples of the confusion among legal writers:

36 Tulane Law Review 148, 149. This writer concludes that it cannot be determined which theory of federal jurisdiction Horton adopted. He suggested three alternatives: the plaintiff viewpoint theory based upon "the value of the right to be protected", the alternative valuation theory based upon the "value of the object sought", or a "realignment of the parties theory".

11 DePaul Law Review 130, 132. This article is critical of Horton, stating: "In recognizing Horton's actions after the filing of the insurance company's suit, the Court has departed from the existing federal rule forbidding reliance on such acts for establishing jurisdiction." He concludes that the Court relied on the counterclaim and thus "broke with precedent" in Horton.

22 La. Law Review 851, 857, concludes that "whatever criticism may be made of other portions of the decision, it appears clear that the Court did not consider itself to be departing from the plaintiff-viewpoint theory." "For this reason it would appear that the Court was not concerned with the counterclaim itself as a vehicle of jurisdiction, and that a counterclaim for less

[2]Witness the strange phenomenon of an apparently confused federal district judge eliciting a promise from a counterclaimant (Aguirre) that he would not do what he had a legal right to do, i.e., amend his state court pleadings. Petition for Writs of Certiorari, Page F-3, Finding No. (10). Of what effect are stipulations and orders of a court which determines that it has no jurisdiction to make them?

than $10,000 would not have defeated jurisdiction properly invoked by the filing of a complaint meeting the jurisdictional requirements."

1962 Duke Law Journal 123, 130. This writer was unable to determine if the "Plaintiff viewpoint rule" was applied or the "alternative valuation" rule. He concludes "the court's opinion fails to give a definite guideline for the lower courts, so that the uncertainty attendant to the application of the earlier rules has been replaced by uncertainty as to the proper interpretation of the holding in the instant case."

46 Minn. Law Review 960, concludes "however the court in the instant case did not look to the counterclaim for the purpose of determining the amount in controversy, but solely to see whether the amount set forth in the complaint was stated in "good faith". He also states "but in fact, the jurisdictional amount is determined from the plaintiff's viewpoint."

11 Amer. University Law Review 102, concludes "it is submitted, however, that the traditional version of the plaintiff viewpoint rule was not overturned in substance * * *."

Denial of the petition for writs of certiorari in the cases at bar heaps confusion on confusion about a matter that this Court has previously said should be governed by "definite and finally accepted principles". Petitioners, along with Judge Rives and Judge Hutcheson, believed that *Horton* was based upon "definite and finally accepted principles", that is, that jurisdiction is determined by the good-faith allegations in the complaint. The majority of the Fifth Circuit reversed this in favor of what appears to be a realignment of the parties doctrine *with the vital element of good faith omitted.*

2. Under the realignment of the parties doctrine, this Honorable Court's opinion in Horton becomes a vain and useless act.

Under the majority of the Fifth Circuit's opinion, the counterclaimant becomes the sole judge of jurisdiction and his determination is subject to review by no one. Thus, under this view, this Honorable Court in *Horton* established a rigid system whereby the federal trial judge will no longer be required to determine jurisdiction; rather, it will be determined for him by the counterclaimant. Thus, under this interpretation, this Honorable Court says that the insurance company has a right to sue in the federal court but this is subject to its adversary's determination of jurisdiction. If this is what *Horton* means, then the Court was, as a practical matter, wasting its own time in deciding *Horton* because such a "right" is no right at all. If this interpretation is correct, there was no need for the Court to set forth the guidelines for determining federal jurisdiction because *only the counterclaimant* makes this decision. EVEN RESPONDENTS THEMSELVES HAVE CRITICIZED THIS VIEW! Petitioners do not believe that this Honorable Court in *Horton* was so naive as to initiate a doctrine which removes from the federal court any control over its own jurisdiction. And yet this is the effect of the denial of the petition for writs of certiorari in the cases at bar. Petitioners believe with Judge Rives and Judge Hutcheson that the *Horton* case represents an application of the "general federal rule" to the facts then before the Court. Petitioners further believe the requirement of good faith must ultimately determine in many cases whether federal jurisdiction can be properly main-

tained. Petitioners do not believe that good faith should be abandoned or should be subject to exclusive, arbitrary and final determination from the mere pleadings of their adversary, the counterclaimant (who is subject to no requirement of good faith by the realignment test of the Fifth Circuit); but should be determined at a pre-trial hearing as set forth in the Federal Rules of Civil Procedure, *if the counterclaimant sees fit to challenge the good faith of the insurer.*

3. The realignment of the parties test prefers one litigant over another.

The "Realignment test" will make the federal courts available to the claimant, should he choose to file suit there; but the insurance company's suit may or may not be retained by the federal court, subject to the absolute discretion of the claimant. In declining to prefer one litigant over another, the Supreme Court of Texas observed in *Ford v. Carpenter, 216 S. W. 2d 558, 560:*

> "We cannot assume that the plaintiff's (claimant's) case is always meritorious or that the defendant is merely seeking to defeat or delay the payment of his just debt. As a court, we must view all parties impartially and assume that they will proceed in good faith * * *."

Undoubtedly, this Honorable Court had these same thoughts in mind when it held in *Horton* that "No matter which party brings it into Court, the controversy remains the same: it involves the same amount of money * * *." Denial of the petition for writs of certiorari repudiates the wholesome doctrine that, "as a court, we must view all parties impartially and assume that they will proceed in good faith."

Since the resident claimant may maintain his suit in federal court but the non-resident insurance carrier may not if the resident objects, this is not only a preference, but a preference that subverts the diversity statute, *28 U. S. C. A. sec. 1332.*

4. Permitting counterclaimant to determine whether a federal court has jurisdiction will delay disposition of cases and will increase the expense of administering justice.

This Honorable Court declared in the Finn case, *supra*, it stood for "prompt and economical" administration of justice. Under the rule of the majority of the Fifth Circuit, an insurance company still has a right to file a direct appeal in the federal court alleging that the injured party has claimed, is claiming, and will claim $14,035. The claimant, however, can defeat federal jurisdiction by filing a counterclaim for less than $10,000. Adjudication of the rights and obligations of both parties will thus be delayed in the federal courts while the question of jurisdiction is determined. Meanwhile, the state court proceeding will await disposition of the federal court case. Neither promptness nor economy will be subserved by this procedure.

5. Confusion can only be obviated if the amount in controversy on a direct appeal by the insurance company is determined from the insurer's standpoint.

When Petitioners filed suit in the federal court, the object sought was a judgment dictating that Respondents take nothing. In Petitioner's view, a potential liability in excess of $10,000 would be eliminated by such a judgment. Respond-

ents argue that before their counterclaims were filed, the maximum value of any judgment which could be entered by the federal court was the amount of the Board's award. From this erroneous premise, they conclude that the total amount in controversy prior to the filing of their counterclaims is the amount of the Board's award. (Hart and Aguirre brief, p. 11; McIntyre's amended brief, pp. 5 and 6.) Even the majority of the Fifth Circuit rejected this theory, stating: "One thing appears clearly from the foregoing language, that is, that the amount of the award does not fix the amount in controversy between the parties when the insurer brings suit to set aside the award." *Hardware Mutual v. McIntyre*, P. A-6, petition for writs of certiorari.

If an injured party claimed and was awarded $14,035 by the Industrial Accident Board, the insurance company sued to be relieved of this in the federal court, and suit in the state court was filed by claimant for $14,035 and a counterclaim for $5,000 was filed in the federal court, counsel for Respondents, to be consistent, would conclude that the federal court *had* jurisdiction. Apparently the majority of the Fifth Circuit would say that it did *not*. This is further illustration of the confusion which will result from denial of the petition for writs of certiorari. It further illustrates the fact that under the majority of the Fifth Circuit's opinion no good faith requirement is in operation and, in fact, bad faith is encouraged.

CONCLUSION

By denial of the writs herein applied for, this Honorable Court: (1) sanctions confusion in the important area of

federal jurisdiction; (2) departs from and nullifies the general federal rule that jurisdiction is determined by the good faith allegations in the complaint; (3) prefers one litigant over the other regardless of the merits, which is positively dangerous to a free society; (4) encourages delay and adds the burden of additional expense to the litigants; (5) repudiates the salutary pronouncements it made in *Finn*; and (6) having caused uncertainty by its decision in *Horton*, this Honorable Court abdicates its exclusive right and duty to clarify this confusion.

Wherefore, Petitioners pray that this matter be reconsidered and this motion for rehearing be granted, that petitions for writs of certiorari in each of the three cases be granted, and that they have the relief prayed for therein.

Respectfully submitted,

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By Reo Knowles
Of Counsel

CERTIFICATE

I, Reo Knowles, of counsel for Petitioners, do hereby certify that the foregoing motion for rehearing is presented in good faith and not for delay and further that this petition for rehearing is restricted to substantial grounds available to Petitioners although not previously presented.

I do further certify that service of copies of the foregoing motion for rehearing has been made on each of the Respondents by mail in accordance with Rule 33 of the Rules of this Court.

Dated this 14th day of November, 1962.

Reo Knowles

REO KNOWLES,
Of Attorneys for Petitioners.